IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 200 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

ABDULKADER ALARAKHA PANJA

Versus

STATE OF GUJARAT

Appearance:

MR AD SHAH for Petitioners

MS KATHABEN GAJJAR, APP for Respondent No. 1

CORAM : MR.JUSTICE M.S.PARIKH

and

MR.JUSTICE H.H.MEHTA

Date of decision: 21/07/2000

JUDGEMENT [Per M.S. Parikh, J.]

1. Present appeal arises from the conviction and sentence of the appellants u/S. 302 read with section 34 of the Indian Penal Code (for short 'IPC') rendered by the Ld. Addl. Sessions Judge, Junagadh on 28/2/1990 in Sessions Case No. 141 of 1988. The 4 appellants, referred to as the accused persons, have been sentenced to imprisonment for life as per the impugned judgment and order.

2. Accused no. 1 - Abdulkadar Alarkha Panja, accused no. 2 - Abdreman Alarkha Panja and accused no. 3 Khalik Alarkha Panja are the real brothers. Accused no. 4 - Nazir Karim happens to be their cousin. It was the prosecution case that around three years before September 30, 1988 Alarkha Panja, father of accused nos. 1 to 3 was killed and in the sessions trial in that respect, deceased Umar Ibrahim, Mahmad Ibrahim Kaji, Suleman Hanif and other accused came to be convicted and sentenced to life imprisonment by the Sessions Court at Junagadh. Other accused persons Juma Isa and Raheman Isa were acquitted in the said trial. Thereafter, the accused persons and members of their family on one side and deceased Umar Ibrahim and his other relatives on the other side had continued differences between them. It has been alleged that around a month before the date of incident (September 30, 1988) aforesaid deceased Umar Ibrahim was released on parole and during such temporary release he was staying at village Maliya. Three days before the date of the incident his wife Rahimaben had gone to take medicines at Junagadh where she was staying with other members of the family in Kishorivada. There was an occasion for performance of some religious ceremony of the son of deceased Umar Ibrahim and for that purpose the members of the family were to go to Porbandar on September 30, 1988. Accordingly deceased Umar Ibrahim, Yusuf Mahmad, Salim Mahmad, Husen Ibrahim, Rahimaben, Mehboobben and Salishben and other relations had reached Junagadh S.T. Bus Stand at around 2.30 O'clock in the afternoon on that day. The bus was to start from platform no. 6 so that the said persons were waiting for the bus, which was brought to the platform at around 3 O'clock in the afternoon. The female persons and the children boarded the bus; whereas complainant Faruq Mahmad as also Salim Mahmad in the company of deceased Umar Ibrahim and other relatives were waiting while talking nearby the entrance of the bus. At that time accused no. 1 Abdulkadar, accused no. 2 Abdreman, accused no. 3 Khalik and accused no. 4 Nazir rushed

with open knives in their hands to the place, addressed Umar Ibrahim that he had killed their father, started hurling abuses and launched assault on him. Accused no. 1 Abdulkadar and accused no. 3 Khalik gave knife blows on the stomach, chest and other parts of Umar Ibrahim's body and accused no. 2 Abdreman and accused no. 4 Nazir gave knife blows on the back of Yusuf Mahmad. Complainant Faruq Mahmad was frightened seeing the incident and ran therefrom and stood nearby the pillar of the platform. He saw the incident from that place. Rahimaben, wife of Umar Ibrahim came out from the bus seeing the incident and during her rescue act to save her husband, accused no. 2 Abdreman gave a knife blow on the throat of Rahimaben. On account of the injuries sustained by Umar Ibrahim and Yusuf Mahmad they fell down in bleeding condition. Yusuf Mahmad died on the spot. On account of the incident the passengers and other persons waiting at the bus stand started running away from the place. In the meantime, three police persons Mulsing Bhursing, Mangalgiri Babugiri and Bhagvanji Shiva rushed from the bus depot to the place of incident. They chased the accused persons and ultimately could succeed in apprehending the accused no. 1 Abdulkadar and accused no. 2 Abdreman with the Muddamal knives. Both the said accused have been taken in a rickshaw to the Junagadh City Police Station and produced before the P.S.O. (Police Station Officer). The complainant and other persons had taken injured Umar Ibrahim and deceased Yusuf as also injured Rahimaben to the hospital where Yusuf Mahmad was declared dead. Injured Umar Ibrahim and Rahimaben were admitted for treatment. However, Umar Ibrahim was in serious condition and died during his treatment. Thereafter, complainant Faruq Mahmad went to the Junagagh City Police Station and gave his complaint before P.I. Mr. Dholetar. At the time of recording of the complaint Police Constable Bhagwanji produced accused no. 1 - Abdulkadar and accused no. 2- Abdreman (Abdul Raheman) and Muddamal knives before the P.S.O. At around 4.00 to 4.45 p.m. Panchnamas of the physical condition of both the accused persons and their clothes as also of muddamal knives were prepared and blood stained muddamal knives and clothes of the accused persons were seized. The said two accused persons were then arrested. The Investigating Officer then recorded Panchnama of scene of offence, recorded statements of the witnesses and went to the hospital where he was informed that it was not possible to record dying declaration of Umar Ibrahim, who was under treatment. Upon the death of Umar Ibrahim inquest Panchnama was recorded and statements and other witnesses were also recorded. At around 3 O'clock in the afternoon on October 1, 1988 accused no. 3 Khalik and

accused no. 4 Nazir presented themselves before the Investigating Officer who arrested them and upon production of muddamal knives by them, necessary Panchnama was prepared. Some effort was made by the Executive Magistrate for recording dying declaration of Umar Ibrahim, but since Umar Ibrahim could not give any statement, necessary report in that respect was submitted. After receipt of the report from the Forensic Science Laboratory in respect of muddamal articles charge-sheet was submitted and ultimately upon committal of the case to the Sessions Court, the accused persons were tried.

3. The accused persons pleaded not guilty at the trial and asserted that deceased Umar Ibrahim was fierce and head strong and was involved in the offence of murder so that some strangers might have killed him out of enmity. They have further asserted that they have been falsely implicated on account of the enmity with the deceased and others with them.

4. At the conclusion of trial and upon hearing of the arguments Ld. Addl. Sessions Judge came to the conclusion that death of Umar Ibrahim and Yusuf Mahmad was homicidal and not natural or accidental, that the accused persons intended to kill Umar Ibrahim and Yusuf Mahmad and with a view to accomplish their common intention they held the weapons like knives, that in furtherance of the aforesaid common intention accused nos. 1 and 3 gave knife blows to Umar Ibrahim and accused nos. 1 and 4 gave knife blows to Yusuf Mahmad and caused such injuries to them as were sufficient in the ordinary course of nature to cause death and four accused persons accordingly committed offence of murder, that accused no. 2 gave knife blow on the neck of Rahimaben and caused voluntary hurt to her and that the prosecution accordingly established the offence/s charged against the accused persons beyond reasonable doubt. Accused nos. 1, 3 and 4 were accordingly held responsible for the offence punishable u/S. 302 of the IPC and accused no. 2 was held to be responsible for the offence punishable u/Ss. 302 and 324 of the IPC. The Ld. Addl. Sessions Judge however, held that the prosecution failed to establish that the accused hurled abuses to Umar Ibrahim, Yusuf Mahmad and the complainant and insulted them with a view to provoke them to commit offence. The Ld. Addl. Sessions Judge has accordingly rendered the impugned judgment and order of conviction and sentence.

5. It might be noted that at the time of trial the

accused nos. 3 and 4 further pleaded that they were not present at the time and place of the incident in question and they had gone to Mangrol. They examined five witnesses in defence. However, Ld. Addl. Sessions Judge has not accepted the defence evidence.

6. When this appeal came up for final hearing the evidence which has been placed on record both on behalf of the prosecution as well as defence has been read. It has been broadly submitted on behalf of the accused persons that the Ld. Addl. Sessions Judge has failed to appreciate properly the defence evidence in so far as accused nos. 3 and 4 are concerned, that the prosecution also failed to establish the facts of the prosecution story beyond reasonable doubt and that the prosecution having failed to explain injuries on the person of the accused nos. 1 and 2 they should have been given benefit of doubt. In reply, the Ld. APP has submitted that there is cogent and convincing evidence produced by the prosecution and the findings of the Ld. Addl. Sessions Judge are unassailable. We would deal with this submission a little later. We will, however, make a brief resume of the evidence that has been placed on record.

7. P.W. 1 Dr. Arjunbhai Gorabhai Rathod, Exh.30 has been examined for placing on record the post mortem report Exh. 31 in respect of deceased Yusuf Mahmad, who was found to have sustained following injuries :-

(i) Incised wound 1" x 1/2" by cavity deep on back of the left chest near medial border of left scapula.

(ii) Incised wound 1" x 1/2" cavity deep on back of the left chest near medial border of left scapula, 1" below injury no. (i), wound going upwards with internal injury of fracture in the 5th rib on left side of the chest with the left lung cover torn.

The death of Yusuf Mahmad was opined to be on account of cardiac respiratory failure due to hemorrhagic shock resulting from the injury to the heart and left lung.

P.W. 2 Dr. Arunray Janakray Mankad has been examined at Exh. 32 in respect of post mortem report exh. 33 concerning deceased Umar Ibrahim who was found to have sustained following injuries :-

(i) Inverted stiched wound 2.1/2" x 3.1/2" on right side of chest wall in between 6th and 7th rib

causing fracture therein.

(ii) Curved stitched wound 16" in length on the upper portion of the abdomen.

(iii) Oblique St. wound about 7" long on the right side of the abdomen and on the right side of the buttock.

(iv) Incised wound 1" x 1/4" x Muscle deep on the left side of the chest back 2" away from mid line and at the level of 6th rib.

(v) St. wound 2" x 2" long on the right wrist and 6th abrasions on both the knees. Corresponding internal injuries have been noted in the post mortem report.

The cause of death of Umar Ibrahim has been opined to be on account of shock and hemorrhage due to injuries to vital organs like liver, stomach, etc.

P.W. 3 Faruq Mahmad Exh. 36 was one of the relations of deceased Umarbhai who had joined the party going to Porbandar on the aforesaid religious occasion. He happened to be deceased Umar Ibrahim's sister's son. Speaking to the facts of the incident in question, the witness has testified that he was standing in the company of Yusuf, Umar Ibrahim and Salim nearby the entrance of the bus. He has spoken to the facts of assault launched by accused persons while holding knives in their hands and giving knife blows to the two deceased persons. According to him Abdulkadar, Khalique and Adreman, three sons of Alarakha Panja and their cousin Nazir Karim rushed with knives in their hands from the opposite direction. They all started abusing the maternal uncle of the witness addressing him that he had murdered their father saying that they assaulted the maternal uncle of the witness. They launched the assault on Umar Ibrahim, the maternal uncle of the witness and Yusuf, the son of the witness's mother's sister. Accused no. 1 Abdulkadar Alarakha and accused no. 3 Khalique Alarakha started giving knife blows to Umarbhai and accused no. 2 Abdreman Alarakha and accused no. 4 Nazir Karim started giving knife blows on the back side of said Umar Ibrahim. Witness therefore, escaped and took shelter standing nearby the pillar of the platform. He saw Rahimaben alighting the bus and intervened. Abdreman accused no. 2 gave a knife blow on the neck of said Rahimaben and accused no. 1 Abdulkadar Alarakha caught hold of Rahimaben's leg and fell her down. People started running away from the scene. Police rushed there. Accused ran away. Police chased them. Thereafter, Yusuf and Rahimaben were taken to the hospital where Yusuf was declared dead and Rahimaben was admitted for treatment.

Umar died on the next day. Witness had given the complaint to the Inspector Dholetra.

Witness No. 4 - Rahimaben, widow of Umar Ibrahim exh. 37 has been examined. She also accompanied the deceased and other relatives for going to Porbandar to attend the religious occasion. Speaking to the facts of the prosecution case, this witness has also testified that when the bus was placed at the platform Husena, Mehmudaben, Sabura, she and her two sons boarded the bus; whereas her husband Umar Ibrahim, Faruq, Salim and Yusuf were standing nearby the bus. She heard a great noise. She therefore, saw outside and noticed accused no. 1 Abdulkadar and accused no. 3 Khalique giving knife blows to her husband Umar Ibrahim. She, therefore, alighted the bus and tried to intervene. At that time she saw accused no.2 Adreman and accused no. 4 Nazir Karim were giving knife blows to Yusuf. When she intervened, the accused no. 2 Abdreman gave knife blow on her leg and accused no. 1 Abdulkadar fell her down. Police rushed there and the accused ran away. She has testified that her husband got injuries on her stomach and chest and his intestine came out. Yusuf sustained injuries on his back side. She and other injured persons were taken in a rickshaw to the hospital and the doctor declared Yusuf having been died. Her husband died on the next day at 4.00 O'clock in the morning. He was unable to speak throughout the period he survived in the hospital. He was however operated.

P.W. 5 exh. 38 - Mangalgiri Babugiri, Police Constable, Buckle No. 1176 was on his duty in the city police station at Junagadh on 30/9/1988 and his duty was at the Junagadh Bus Stand. He was accompanied with Police Constable Mulsinh. The incident in question occurred around 3 to 3.15 O'clock in the afternoon. When he heard the noise and the shouts of protection, they came to know that something was going on towards the eastern direction. Both the constables therefore, rushed to platform no. 6 where they found that two persons were lying in bleeding condition, one was nearby the front portion of the bus and the another person was nearby the rear portion of the bus. The witness saw two persons escaping, one wearing Jabbha was running with a knife in his hand. The witness chased him. When he fell down while climbing down the compound wall, the witness caught hold of him. He had blood stained knife in his hand. Identifying the said person as accused no. 1 Abdulkadar Alarakha Panja the witness deposed that the said accused no. 1 was produced with the knife before the Police Station Officer in the city police station.

P.W. 6 - Bhagvanji Shivabhai, exh. 39 Police Constable, buckle no. 736, was on duty at the S.T. Bus Stand on 30/9/1988. There were other two police constables performing their duty at the Bus Stand. The incident occurred at around 3.00 O'clock in the afternoon. He saw 4 persons running away after assaulting with knives. He chased them. Two persons ran towards northern direction and two persons ran towards eastern direction. He chased persons running towards eastern direction. He and constable Mulsinh caught hold of one accused person. He held blood stained knife in his hand. He was produced before the Police Station Officer in the police station. When they have presented them constables Mulsinh and Mangalgiri also brought other accused persons. It was at around 3.30 O'clock in the afternoon. The witness identified the person caught hold of by him as accused no. 1 Abdulkadar Alarakha. He deposed that he could not identify the accused apprehended and produce by constable Mangalgiri.

P.W. 7 - Dr. Bhalchandra Narmadashankar Joshi, exh. 40 has been examined since when the witness was on his duty as the doctor in O.P.D. Junagadh, Umar Ibrahim and Rahimaben were brought to the hospital at 3.10 O'clock afternoon. In so far as Umar Ibrahim is concerned, he noticed following injuries :-

(i) stab wound on right side of chest
(ii) stab wound on epigastrium near the first injury
(iii) stab wound on right paraumbilical region
(iv) stab wound on right sub costal region
(v) stab wound just below injury no.4.
(vi) stab wound on left side near the sub costal region

When the patient was operated it was found :-
(i) Peritoneal cavity was full of blood
(ii) stomach perforated with wall perforation wound 1/2" in lengthoozing out food particles
(iii) lacerated wound around 4" in length on the outer surface of stomach
(iv) wall of gall bladder was partially cut 1 c.m. near fundes
(v) tear in left surface of liver left lobe 1 c.m. in length on the lrft lobe surface of liver (superficial in nature)
(vi) two perforations on intestinal elliam
(vii) tear on upper surface of liver extending upto injury no.4.

The witness opined that the injuries could be caused by the two muddamal knives.

This witness has further referred to the following injuries sustained by witness Rahimaben :-

(i) one incised wound 2 cm x 5 cm x muscle deep on the root of neck left side in Supraclavicular region. Direction oblique. Bleeding + T.

According to him these injuries could be caused by the Muddamal knife shown to him. The injured woman was discharged on the next day (1/10/1988).

P.W. 8 - Pankajbhai Maganlal, exh. 44 is the Panch witness to Panchnama exh. 45 with regard to two knives containing blood stains with the clothes also containing blood stains. This witness, however, has been permitted to be cross-examined by the prosecution.

P.W. 9 Vijaykumar Amrutlal, exh. 46 has been examined as another Panch witness to Panchnama exh. 45. He has also been permitted to be cross-examined by the prosecution.

P.W. 10 Iqbalbhai Ismail, exh. 47 is Panch witness to Panchnama exh. 48 regarding production of a knife by accused Abdul Khliq Alarakha. This witness has also been permitted to be cross-examined by the prosecution.

P.W. 11 Alipir Mahmadbhai, exh. 49, a Panch witness to Panchnama exh. 50 in respect of scene of offence and collection of blood stained earthern portions as well as find of cover of knife.

P.W. 12 Maheshchandra Govindji, exh. 51 is the Head Constable who was on duty as P.S.O. in Junagadh City Police Station on 30/9/1988 between 12 noon and 8 at night. He has testified that at 3.00 O'clock afternoon one constable produced one accused and two minutes thereafter another constable produced another accused. He accordingly informed the P.I. who said that he was writing the complaint and the witness to wait. The P.I. recorded the complaint mark A and sent it to this witness, who registered the offence. Further investigation was handed over to the P.I. The witness wrote a Yadi exh. 52 to the Executive Magistrate for recording dying declaration of Umar Ibrahim. The Yadi recites that Umar Ibrahim having been seriously injured in a fight has been admitted in M.S.W. ward of General

Hospital and his dying declaration is required to be recorded. Witness has also referred to Yadi exh. 55 addressed by the Medical officer, General Hospital, Junagadh to P.I. Junagadh City Police Station on 1/10/1988 stating that the aforesaid injured died at 3.45 O'clock on 1/10/1988.

P.W. 13 Govindbhai Hamirbhai, exh. 57 happened to be a watchman at the Junagadh S.T. Depot performing his duty from 8.00 a.m. to 4.00 p.m. on 30/9/1988. This witness has been permitted to be cross-examined by the prosecution.

P.W. 14 Arjunsinh Pratapsinh Dholetar, exh. 58 is the P.I. Crime Branch, Ahmedabad, who was serving as P.I. in Junagadh City Police Station on 30/9/1988. He has testified that complainant Faruq Mahmad went to the police station at around 3.45 O'clock in the afternoon and gave his complaint to this witness, who had written it on a blank piece of paper and directed the same for registering the offence to P.S.O. Mr. Maheshkumar. The complaint so recorded by him appears at exh. 26.

The defence had examined Hussein Habib, D.W. 1 exh. 63, D.W. 2 Kadar Habib, exh.68, D.W. 3 Intiyaj Hasan exh.70, D.W.4 Mahmad Hussein Mamadmiya Kadri, exh.71 and D.W. 5 Bashirabdul Abdul Karim, exh. 72 essentially in respect of plea of alibi canvassed by accused no.3 Khaliq Alarakha Panja and Nazir Karim Panja.

8. Prosecution has placed on record following documentary evidence :-

Exh. 18 is the inquest Panchnama in respect of dead body of deceased Yusuf Mahmad with his clothes noted to be blood stained and with cuts of two wounds on the back side of the shoulder noticed by the Panch witnesses. This Panchnama is drawn on 30/9/1988 between 4.30 and 5.15 p.m.

Exh. 19 is the inquest Panchnama in respect of dead body of deceased Umar Ibrahim withblendages on chest and waist. This Panchnama has been drawn on 1/10/1988 between 4.30 and 5.10 p.m.

Exh. 20 is the Panchnama in respect of blood stained clothes of deceased Umar Ibrahim drawn on 1/10/1988 between 6 and 6.30 p.m.

Exh. 21 is the Panchnama with regard to blood stained clothes of deceased Yusuf Mahmad after post

mortem was performed. This Panchnama has been drawn on 3/10/1988 between 11.30 and 12.00 noon.

Exh. 22 is the despatch note addressed by the concerned police authority to the Forensic Science Laboratory sending therewith Muddamal articles.

Exh. 23 to 25 form communications and the reports from Forensic Science Laboratory and Chemical Analyser. They inter-alia indicate that both the deceased had blood group "O" which was found on Muddamal knives recovered from the accused nos. 1 and 2 - Abdulkadar and Abdreman Alarakha. The Muddamal knife alleged to have been recovered from accused no. 3 Khalik Alarakha also shows blood group "O", although from the apparent examination the knife did not contain the blood stains. The knife alleged to have been recovered from accused no. 4 does not show any blood stains either in the Forensic Science Laboratory examination or in the examination by the Assistant Chemical Analyser.

Exhx. 26 and 27 are respectively the F.I.R. and its copy.

Exh. 94 is the communication from jail authority of Ahmedabad Central Jail addressed on 20/8/1988 to the I.G.P. State of Gujarat inter-alia stating therein that Umar Ibrahim (since deceased) was enlarged on parole for a period of 60 days on 29/8/1988.

Exh. 31 is the post mortem report of deceased Yusuf Mahmad.

Exh. 33 is the post mortem report of deceased Umar Ibrahim.

Exhs. 41 and 42 are the medical certificates concerning Umar Ibrahim who was hospitalised before he died.

Exh. 45 is the Panchnama with regard to production of respective blood stained knives by accused no. 1 Abdul Kadar Alarakha and accused no. 2 Adreman Alarakha coupled with the blood stained clothes of the respective accused. The defence has also referred to this Panchnama for the purpose of showing that accused no. 1 Abdul Kadar has minor injuries on his chest and hand; whereas accused no. 2 Abdreman Alarakha has blunt injuries.

Exh. 48 is the Panchnama with regard to recovery

of knives from accused no. 3 Khalid Alarakha and accused no. 4 Nazir Karim. This Panchnama is dated 1/10/1988 and recorded between 2.30 and 3.00 in the afternoon. Both the knives have been shown to be without blood stains.

Exh. 50 is the Panchnama with regard to scene of offence and collection of samples of blood stains and blood stained earth from the scene of offence as also discovery of two leather covers of knives.

Exh. 52 is communication dated 30/9/1988 addressed by P.S.O. Junagadh City Police Station to the Executive Magistrate, Junagadh for the purpose of recording dying declaration of Umar Ibrahim (since deceased). Exh. 54 is the copy thereof.

Exh. 55 is the Yadi (communication) dated 1/10/1988 from Medical Officer, General Hospital, Junagadh to the P.I. Junagadh City Police Station informing that Umar Ibrahim died at 3.45 O'clock on 1/10/1988.

Defence has also placed on record bills of Panja Abdreman Alarakhabhai & Company at exhs. 64 to 66, inland letter at exh. 67 and note (Chithi) at exh. 69. Extracts from police diary and case diary have also been placed on record at Exhs. 78 and 79.

With the aforesaid synopsis of evidence placed on record before the trial Court, submissions madeon behalf of the appellants and on behalf of the respondent State of Gujarat might now be considered.

9. Mr. A.D. Shah, Ld. counsel for the appellants-accused has in the first place submitted that deceased Umar Ibrahim was head strong person who was involved in commission of the offences, more particularly the offence of murder, so that some strangers might have assaulted and killed him out of enmity. He, however, has mainly argued that the prosecution failed to prove beyond reasonable doubt the manner in which the incident has occurred and the involvement of four accused persons in the case of the offences charged against them. He in the first place has referred to the evidence of some of the witnesses including the Yadi (report) exh. 43. Such evidence has been referred to for highlighting the possibility of the manner in which the incident occurred. Reference in this connection has been made to the word ' ' (free fight) appearing in report exh. 43. Reading the evidence of P.W. 1 Dr. Arjunbhai Gorabhai Rathod, exh. 30, P.W. 2 Dr. Arunray Janakray Mankad,

exh.32 and P.W. 7 Dr. Bhalchandra Narmadashankar Joshi, exh. 40 it has been submitted that the injuries noted by the respective doctors do not go to show beyond reasonable doubt the manner in which assault must have been started. Yusuf Mahmad was found to have sustained incised wounds cavity deep on the back of the left chest and Umar Ibrahim sustained number of injuries on right side of his chest and abdomen. Besides, he also sustained injuries on right wrist and left side of the chest. Detailed injuries have been noted by Dr. Bhalchandra Narmadashankar Joshi P.W.7 exh. 40. It has been submitted from all these injuries sustained by the two deceased persons Yusuf Mahmad and Umar Ibrahim that the prosecution has failed to rule out free exchange of hands or free fight at the time and place of the incident.

With regard to involvement of 4 accused persons Mr. Shah placed reliance upon defence of alibi in so far as accused nos. 3 and 4 Khalik Alarakha Panja and Nazir Karim Panja are concerned. According to his submission the trial Court has failed to consider letter dated 30/9/1988 written by Amad Abdul Karim Panja (brother of accused no. 4 - Nazir Karim Panja). He has also placed reliance upon the defence witnesses for canvassing plea of alibi with regard to said two accused.

It would, therefore, appear from the submissions of Mr. Shah that broadly the defence of the accused persons would consist of the manner in which the incident occurred and involvement of all the 4 accused persons or two of them, namely first 2 accused persons on account of plea of alibi of accused nos. 3 and 4.

10. It would be appropriate to deal with the plea of alibi in so far as the accused nos. 3 and 4 are concerned. At the outset, it might be noted that there is positive evidence of witnesses Faruq Mahmad P.W. 3 exh. 36, Rahimaben, widow of Umar Ibrahim, P.W. 4 exh. 37 and the police constables speaking about presence of all the 4 accused persons. First two out of the aforesaid witnesses have come out with positive story about the involvement of the 4 accused in the incident in question. They are supported by the find of blood stained knives in so far as atleast first 2 accused persons are concerned. It is unassailable that there was enmity between the members of the respective families in view of the fact that father of the first 3 accused persons - Alarakha Panja came to be killed around 3 years before the date of the incident in question and in the

sessions trial in that respect Umar Ibrahim, since deceased as a result of the assault in question, Mahmad Ibrahim Kaji, Suleman Hanif and other accused came to be convicted and sentenced to life imprisonment by the Sessions Court at Junagadh. Therefore, the prosecution could place on record such facts as would show motive on the part of the first 3 accused persons in launching the assault on the day of incident (September 30, 1988). It has been undisputably brought to light that Umar Ibrahim was released on parole and during his such temporary release he was staying at village Maliya. Three days before the date of incident his wife Rahimaben had gone to take medicines at Junagadh where she was staying with other members of the family. There was an occasion for performance of some religious ceremony of the son of deceased Umar Ibrahim and for that purpose the members of the family were to go to Porbandar on 30/9/1988. On that occasion deceased Umar Ibrahim, Yusuf Mahmad, Salim Mahmad, Husen Ibrahim, Rahimaben, Mehboobben and Salishben and other relations had reached Junagadh S.T. Bus Stand at around 2.30 O'clock in the afternoon on that day. Now these facts which can hardly be disputed would clearly indicate that persons belonging to the prosecution party were busy with the occasion in the family as aforesaid and none of them could have any intention of entering into any quarrel, scuffle or anything of the sort. They could not have any such prior state of mind when they were at the S.T. Bus Stand where the incident occurred. Then comes the question why the accused persons or any of them appeared at the said Bus Stand. It is true that the Court is not to look to the explanation or lack of explanation on the part of accused persons as to whether they appeared at the S.T. Bus Stand or not or as to why they reached there. But then the evidence of the first 2 of the aforesaid witnesses as corroborated by medical evidence and the evidence of find of blood stained knives indicates that the 4 accused persons rushed running towards the bus in which the persons of the prosecution party were to travel. It would become clear that the 4 accused persons or any of them had clearly a state of mind which can atleast be described as teaching of lesson to the assailants of the father of the first 3 accused persons. Accused no. 4 might also have such a state of mind as to assist first 3 accused persons in approaching persons of the prosecuting party at the S.T. Bus Stand with an intention to teach a lesson to them. What is important to be noticed from these facts which can hardly be disputed is that till upto the time the persons of the prosecution party had to face the assault from the accused persons or any of them, there could not be any intention on their part to have

any quarrel or scuffle with the accused persons or any of them. Bearing this basic feature of prosecution case and evidence in support thereof defence evidence might be considered.

Defence evidence :

11. In the first place Mr. Shah, Learned Advocate for the appellants referred to exh. 67 which is the letter addressed by Amad A. Karim Salam (Panja) of Junagadh to one Sheth Hussen Habib of Mangrol, Kazi'a Maholla, near well, Mangrol. It has been recited in the letter that appellant no. 3 Khalik and accused no. 4 Nazir had been to Mangrol for collection of dues and they might be detained there after the work of collection was over since some one assaulted Umar Ibrahim, who was sentenced in the case of murder of maternal uncle and his nephew Farooq, at the bus stand and Yusuf was killed and Umar was injured in the said incident and there was likelihood of members of the family of the writer of the letter being named on account of enmity with the said persons (Umar Ibrahim and Farooq). It has also been recited that as and when the facts were cleared accused nos. 3 and 4 Khalik and Nazir might be permitted to leave Mangrol upon receipt of a chit (note) or telegram from the writer of the letter. The date on which the letter was written is stated at the top to be 30/9/1988 - the date of incident in question.

12. On the same day exh. 69 being note was written by the same person to Kadar Habib. It has been recited that the names of accused no. 3 Khalik and accused no. 4 Nazir have been disclosed and police had visited the house and that Khalik and Nazir should report at the earliest. It has further been recited that the writer of the note informed the police that they (Khalik and Nazir) had gone out of station and they would report as soon as they would arrive. Accordingly upon receipt of the note Kadir Habib has been requested to send them (Khalik and Nazir) to Junagadh as they were to be produced before the police on the next morning. It has finally been recited that one note has been written to Sheth Hussen Habib and one letter has been written to the addressee.

13. At the outset, it might be noted that both the aforesaid documents have not been accepted as reliable pieces of evidence mainly for the reason that the accused had not put up the case of alibi supported by the aforesaid two documents at the earliest, namely at the time when they had the occasions to prefer bail

applications. It would appear that the trial Court has not addressed itself with regard to the genuineness of the documents, more particularly exh. 67. Mr. A.D. Shah had taken us through both the doucments, more particularly exh. 67, which is inland letter. We had the occasion to examine the postal stamps for finding out genuineness or otherwise of the documents. It would appear that exh. 67 must have been written but not presented or canvassed at the earliest point of time. However, the tenor of exh. 67 coupled with the tenor of note exh. 69 would clearly indicate that for a specific purpose of presenting plea of alibi at an appropriate point of time, the writer of the letter must have written the same under some expert advice. Be that it may, it would clearly appear that the writer of the letter, who happens to be the brother of accused no. 4 knew on the day of incident itself the fact with regard to the incident having taken place. He also knew about Umar Ibrahim having been injured and Yusuf having been killed in the incident. The facts with regard to first two accused having gone for collection of outstanding in the town itself (Junagadh) do not appear to be correct in as much as they were involved in the incident and the prosecution evidence is unassailable on that part of the case. It would also appear from exh. 67 as well as exh. 69 that in the first place accused nos. 3 and 4 were sought to be detained at Mangrol; whereas in the second place they were sought to be sent back to Junagadh as they were required to be produced before the police. Besides, the distance between Mangrol and Junagadh is not such as cannot be crossed over immediately after the incident occurred. Incident occurred at around 3.30 in the afternoon. It has appeared in the prosecution evidence that first two accused persons were apprehended by the police immediately after the incident, whereas accused nos. 3 and 4 had the occasion to escape. It was quite probable for them to have left Junagadh for Mangrol which was at a distance of around 60 Kms. Therefore, bearing in mind the tenor of two documents possibility of the writer of the documents being under expert advice at the threshold cannot be ruled out.

14. In the background of the aforesaid discussion with regard to exh. 67 and exh. 69 evidence of defence witnesses might be considered.

D.W. 1 Hussen Habib exh. 63 has his shop of selling fruits in the vegetable market at Mangrol. At the relevant point of time he used to purchase fruits for his shop from the shops of Thakkar Girishkumar Harilal, Salimbhai Maherali and Panja A. Alarakha of Junagadh.

In respect of accused nos. 3 and 4 the witness deposed that he knew them and accused no. 4 was son of sister of first 3 accused. If he could not manage to go to Junagadh during 24th or 25th of every month, the accounts of purchases are settled on the last day of the month. Accused nos. 3 and 4 used to visit Mangrol for such accounts and necessary endorsements in that respect are made on the bills. According to this witness accused nos. 3 and 4 had gone to him at around 11 O'clock in the morning on 30/9/1988 for collection of outstanding amounts. He was informed that they had been to Mangrol on the previous evening. They had stayed over night at the house of Kadarbhai. Referring to the bills dated 12/9/1988, 21/9/1988 and 28/9/1988 which were brought by him the witness deposed that endorsements of encashment of the bills were made thereon. The bills were accordingly placed on record at exhs. 64, 65 and 66. The witness has further deposed that accused nos. 3 and 4 stayed over till upto the evening at his place and had taken lunch with him at his house. He has then deposed that at around 1 O'clock in the afternoon, they had left the house and the witness had also gone to his shop at around 1.30 in the afternoon. The accused nos. 3 and 4 reached his shop at around 2.30 O'clock in the afternoon and they stayed over there till upto 7 O'clock in the evening. He had received a chit (note) from Kadarbhai's son telling him that the note was received from Junagadh. Accused nos. 3 and 4 had taken the note and had gone to Kadarbhai's house. On inquiry from Kadarbhai, the witness came to know that there was some incident at Junagadh and accused nos. 3 and 4 were called there. They then went to the bus stand and the witness went home. The witness has also deposed having received the letter exh. 67 on 1/10/1988. In his cross-examination the witness has admitted that he did not have any other bills for showing that the accused had collected outstanding amounts from him on other occasions. He then corrected saying that he had such bills at Mangrol. He had not read the contents of exh. 67 and had handed over the letter to accused no.3. In this respect he gave double version, at first he testified that it was not necessary for him to read the letter whereas soon thereafter he testified that he read the letter. Once again he testified that he did not know what was written in the inland letter. He also did not talk about the bills to Shri Nanavati. He, however, admitted that he came to know that two persons had been apprehended in the incident which occurred on 30/9/1988 and names of two other persons were disclosed. He came to know about these facts on the same day. It has to be noted that the witness has testified having received the inland letter

at 11 O'clock in the morning on 1/10/1988 and both the accused had left Mangrol at around 7 O'clock on that day. He has finally admitted that he did not inform the police that accused nos. 3 and 4 were by his side on the day of incident till upto the time when they left Mangrol on 1/10/1988. He has admitted that the accused persons had moved number of bail applications in the Court, but he had no occasion to file affidavit stating the aforesaid facts. He has finally admitted that he did not receive any note other than the inland letter.

D.W. 2 Kadarbhai Habib, exh. 68 has testified about the accused nos. 3 and 4 having gone to his house at Mangrol in the evening of the day prior to 30/9/1988 and they had stayed over at his house over night. This witness has also deposed to the facts about the accused nos. 3 and 4 having gone to Mangrol for collection of outstandings. He has deposed to the note exh. 69 received by him and sent with his son to the earlier witness. In his cross-examination he has admitted that he did not receive any other communication except note exh. 69. He inquired of Imtiyajbhai, who had brought the note as to why accused nos. 3 and 4 were called by the police and Imtiyajbhai informed the witness that there was some quarrel in respect of which accused nos. 3 and 4 were called. This witness has also admitted that he did not inform the police about the aforesaid facts at any point of time prior to his deposition and he had no occasion to file any affidavit in support of applications for bail moved by accused nos. 3 and 4.

Imtiyajbhai Hasanbhai D.W. 3 exh. 70 has deposed to the facts with regard to he having taken the note exh. 69 from Junagadh to mangrol. The note was handed over to him by accused no.4 Nazir's brother Amad. He reached Mangrol at around 7 O'clock in the evening. He, however, returned to Junagadh in the next morning. In his cross-examination he has admitted that Amadbhai has been serving in State Transport and he was a distant relative of Amadbhai. He has admitted that every day at about 5 O'clock in the evening he goes to Mangrol from Junagadh during the season of fish catching. This witness has also admitted that he did not inform the police about the facts deposed to by him.

Mahmad Hussen Mamadmiya Kadri, D.W. 4 exh. 71 is the rickshaw driver of Junagadh and he knew deceased Umar Ibrahim and deceased Yusuf Mahmad. He also knew witness Rahimaben, wife of Umarbhai. According to him the incident occurred at the Junagadh bus stand and he saw people running away from the place of incident. He

did not see any known persons going out of the gate where he was standing by the side of rickshaw. He saw two police persons going out of the bus stand, but he did not see any police person having caught hold of any body in or outside the bus stand. When he saw people running out of the bus stand he went to platform no. 6 for inquiring about what happened and found that deceased Umar was sitting near the pillar of platform no.6 and his sister's son Yusuf was lying in front of plat form no.7. No one else was present there. At the say of Govindbhai he had taken his rickshaw to platform no. 6 and Umarbhai and Govindbhai assisted him to take Umarbhai and Yusufbhai into his rickshaw. The witness has deposed that he did not know if there was any other person. But the person who had lifted Yusuf also sat in his rickshaw. Umarbhai was not in a position to speak or move. He had taken the rickshaw to Junagadh Civil Hospital. When Umarbhai had alighted the rickshaw, he (Umar) asked him (witness) to send the message at his house. He, therefore, went to the house of Umarbhai and informed his wife (Umarbhai's wife) Rahimaben and other female folk as well as Farooq and Salim that Umarbhai was admitted to the hospital and since Umarbhai asked him about giving message he was there to do so. Hence, they (Rahimaben and others) had gone to the hospital in his rickshaw. In his cross-examination he has admitted that there were 20 to 25 other rickshaws parked near the bus stand, but he did not know whether other rickshaw drivers had gone to the place of incident just as he had gone there. He has also admitted that Anvarbhai's stall was located between plat form nos. 6 and 7 in the rear portion. He has admitted that he never informed the police about what he deposed. Upon having received the news regarding the incident and regarding the two injured persons having died, he came to know that they were injured in some quarrel. In his last part of the cross-examination he has admitted that he has been visiting the Court quite frequently. He has denied the suggestion that he was attending to the work of getting accused persons released on bail. He has, however, finally testified that he did not know if Chief Judicial Magistrate of Junagadh declared him as professional surety. It is interesting to note that the witness admitted that he did not have any occasion to talk to Rahimaben when she sat by the side of her husband in his rickshaw. This admission would falsify his story when he deposed that at the say of injured Umar he had gone to his house, informed Rahimaben and other persons of his family about injured Umar and brought them to the hospital.

Basirabdul A. Karim D.W. 5 exh. 72 happens to

be elder brother of Nazir accused no.4. However, there appears to be difference in his name stated in his deposition and his name inscribed below the letter exh. 67. Be that it may, he has deposed that he was working in the divisional workshop of S.T. at Junagadh, where he came to know about the incident at around 3.15 p.m. He went home when his duty was over at around 4 O'clock in the afternoon. His mother informed him that accused nos. 3 and 4 had gone to Mangrol and accused nos. 1 and 2 were apprehended by the police. The witness, therefore, wrote inland letter exh. 67 which was mailed at around 4.15 O'clock in the afternoon. The witness then went to the City Police Station and saw P.I. Mr. Dholetar. He asked why his brothers (accused no. 1 and 2) were apprehended and the police officer informed him that they were apprehended in the offence of murder and names of accused nos. 3 and 4 were also disclosed and they should be produced. He has then been referred to exh. 69 the note which he sent for accused nos. 3 and 4 being sent back to Junagadh. They reached Junagadh at around 12 O'clock at night and they were produced on the next morning before P.I. Mr. Dholetar. He has deposed that Umar Ibrahim was head strong and over and above he having killed his maternal uncle he was involved also in other cases including a case of having assaulted Bhikha Vaghri and having been involved in the case u/S. 307 of the IPC, as also in the case of murder of Babu Musa. According to him Umar Ibrahim was running a gambling club in the name of 'Ajanta Club' and was involved in the business of Charas, for which he was facing number of cases. In his cross-examination he has deposed that he had sent the leave report after 3 to 4 days. He has admitted that his brother moved number of bail applications, but he did not know how many such applications were moved by him. He admitted that he never had any occasion to file affidavit in support of any of the bail applications and produce inland letter exh. 67 and note exh. 69 or to talk about the same to any one prior to the date of his deposition.

15. Weighing defence evidence in the light of the prosecution evidence and bearing in mind the fact that none of the defence witnesses had any occasion to inform about the facts regarding plea of alibi of accused nos. 3 and 4 at any point of time prior to their depositions, the trial Court came to the conclusion that defence evidence was got up with a view to help the accused persons. It might be noted from exh. 48, the Panchnama with regard to recovery of knives from accused no. 3 Khalik and accused no. 4 Nazir Karim that apparently both the knives were shown to be without blood stains but

upon scientific and chemical examination of both the knives it has appeared that the Muddamal knife alleged to have been recovered from the accused no. 3 Khalik also showed blood group 'O', although on apparent examination the knife did not display blood stains. This would show presence of accused no. 3 at the scene of offence during the time when the incident occurred. That means that plea of alibi as stated above has been canvassed at the fag end of the trial, although it might have been made available soon after the incident in the manner in which it has been stated hereinabove. The defence witnesses clearly appear to be not telling the truth about presence of the accused no. 3 and 4 at around 3.30 p.m. to 6.00 p.m. on the day of incident at Mangrol.

16. In our considered opinion even the circumstances flowing from the tenor of the documents exh. 67 and exh. 69 as also the depositions of the aforesaid witnesses go to indicate that the defence has been set up under expert advice which clearly appears to have been made available on the day of incident itself. Be that it may, defence of alibi runs counter to the prosecution evidence which stands corroborated by scientific evidence as stated above and therefore, merits rejection.

17. Ms. B.R. Gajjar, Ld. APP has dealt with the aforesaid evidence of defence witnesses in her submissions and has submitted that the same cannot be relied upon because the name inscribed on exh. 67 and exh. 72 differ from the name of the witness. Besides Mangrol is at a distance of hardly one and half hours' journey from Junagadh and even if the accused nos. 3 and 4 had gone to Mangrol, they must have gone after having escaped from police soon after the incident in which they were involved. There appears to be a great deal of substance in these submissions.

18. In our considered opinion and bearing in mind the clinching circumstances flowing from the prosecution evidence presence of accused nos. 3 and 4 at the time of incident in question at platform no. 6 of Junagadh S.T. Bus Stand cannot be doubted. Question is as to how the incident occurred.

MANNER OF OCCURENCE OF THE INCIDENT :

19. On going through the aforesaid evidence it would clearly appear that the submissions to the effect that some strangers might have assaulted the deceased persons in the incident in question cannot be accepted. In fact there is no substance in the submission in that regard in

the face of the evidence as aforesaid. It would be appropriate to deal with the manner in which the incident occurred for finding out whether the manner in which the incident as presented has been established beyond reasonable doubt by the prosecution. Reference in that respect has first been made to exh. 43, the Yadi. It is no-doubt true that exh. 43 does make use of the word ' ' (free fight). There is sufficient material to show that it was an assault from one side, namely the respective accused persons. P.W. 3 Faruq Mahmad, exh. 36 speaking to the facts of the incident in question has testified that when he was standing in the company of Yusuf Mahmad and Salim nearby the entrance of the bus, the accused persons while holding knives in their hands assaulted them with the knives giving knife blows to the two deceased persons. They first started abusing his maternal uncle saying that he had murdered their father. They accordingly launched assault on Umar Ibrahim, the maternal uncle of the witness, and on Yusuf, son of the witness's mother's sister. Accused no. 1 Abdulkadar and accused no. 3 Khalik gave knife blows to deceased Umar and accused no. 2 Abdreman and accused no. 4 Nazir started giving knife blows on the back side of deceased Yusuf. He saw Rahimaben alighting bus and intervening with the result that the accused no. 2 Abdreman gave knife blow on the neck of said Rahimaben and accused no. 1 Abdul Kadar caught hold of her leg and fell her down. Referring to his cross-examination it has been submitted that there were many people inside the bus stand. There were shops and stalls. The witness saw the accused persons running away with the knives in their hands from the distance of about 10 to 12 ft. and apprehending that he also might sustain injuries, he escaped running towards the pillar of the platform and took shelter near the pillar at a distance of about 25 to 30 ft. from the place of the incident. Salim had also run away in the same manner. The accused persons launched assault, gave knife blows and escaped running away from the place of incident within 3 to 4 minutes. Referring to his cross-examination it has been submitted that manner of occurrence of the incident has fallen to doubt and possibility of rival parties having assaulted each other cannot be ruled out. This submission clearly appears to be improbable to be accepted in as much as the persons belonging to complainant party (including two deceased persons) had gone to the bus stand for a particular occasion to be attended to at Porbandar. It is not the case of the accused persons that they had also any such occasion or any work for which they were required to go to the bus stand. Comparison of the injuries sustained by the two deceased persons with the minor injuries

sustained by the first 2 accused persons would also go to show that the accused persons must have initiated and launched the assault and it is possible that there might be some defence action without there being any weapons with the persons belonging to the complainant party which might have caused the minor injuries alleged by the accused persons. This will be dealt with a little later. What is important to be noticed is that although the incident has occurred within a very short span of 3 to 4 minutes according to this witness, there does not appear to be any doubt with regard to the fact that accused persons initiated the assault.

20. Rahimaben, P.W. 4 exh. 37 has also testified about the incident saying that upon hearing the great noise she saw outside and noticed accused nos. 1 and 3 giving knife blows to her husband Umar Ibrahim and when she alighted the bus and tried to intervene, she saw accused no.2 Abdreman and accused no. 4 Nazir giving knife blows to deceased Yusuf and when she intervened, accused no. 2 Abdreman gave knife blow on her leg and accused no. 1 Abdulkadar fell her down. Thus, actual or active participation on the part of accused no.4 in the incident in question becomes doubtful when the knife recovered from accused no. 4 is found containing no blood stains. This is the only difference which surfaces upon appropriate appreciation of evidence of both these witnesses. In respect of rest of the incident, both the witnesses have been corroborated by medical evidence as well as evidence of other witnesses as can be noticed from the synopsis of evidence and the discussion thereof by the learned trial Judge. With regard to the report exh. 43 it might also be noted that witness no. 3 Faruq Mahmad has given his complaint to Inspector Mr. Dholetar at the earliest point of time and the use of word ' ' (free fight) in the report exh.43 appears to be abbreviated one for the ultimate narration of the incident.

21. Ms. B.R. Gajjar, Ld. APP submitted that P.W. 14 exh. 58 Arjunsinh Pratapsinh Dholetar, P.I. of Junagadh Police Station has supported the prosecution case and, therefore, the submissions with regard to usage of the word ' ' (free fight) should be discarded as misconceived as well as misguiding. As we have already said report exh. 43 using the aforesaid word will not take the defence any further in the face of the prosecution evidence and the circumstances attending the incident.

22. It has been submitted that some of the accused

persons have sustained injuries and prosecution has failed to explain such injuries and, therefore, appropriate benefit of doubt should go to the said accused persons. A reference in this connection has been made to Panchnama exh. 45 referring to accused no. 1 Abdulkadar and accused no. 2 Abdreman having presented themselves with blood stained knives at the Junagadh City Police Station at 4.00 O'clock in the afternoon on the day of incident. It has been recited in the last paragraph that there is minor injury on the chest of accused no. 1 Abdulkadar and there is a blunt injury to accused no. 2 Abdreman. On one hand this recital would go to support the prosecution case with regard to actual participation of the said accused in the assault and on the other hand the injuries to the accused persons as noted in exh. 45 are so trivial that neither the investigating agency nor the accused persons thought them worthwhile to be noted by any medical person and if noted, to be placed on record. Ld. APP has made reference to a decision of the Hon'ble Supreme Court in the case of Hare Krishna Singh v. State of Bihar reported in 1988 Criminal Law Journal page 925. It speaks of the proposition of law that it is not necessary for the prosecution in each and every case to explain injuries sustained by the accused persons, particularly when injuries are minor or trivial in nature.

23. Having heard the learned advocate for the accused persons as well as Ld. A.P.P. for the State, we are of the opinion that first 3 accused persons must have had the intention to teach the lesson to the deceased Umar Ibrahim and his relatives while proceeding to the bus stand where Umar Ibrahim and his relatives were present. Accused no. 4 might have had an intention to assist the other accused in teaching lesson to deceased Umar Ibrahim and others. After all, father of first 3 accused persons was murdered by deceased Umar Ibrahim and his associates. The manner of the incident would indicate that upon seeing Umar Ibrahim first 3 accused persons being the sons of deceased Alarakha Panja, who was killed by Umar Ibrahim, obviously must have developed intention to kill Umar Ibrahim in the spur of the moment. This is apparent from the nature of the injuries sustained by Umar Ibrahim and Yusuf as also the nature and manner of the occurrence of the incident. It would also appear from the evidence as stated above that the prosecution has failed to establish beyond reasonable doubt actual giving of knife blow or knife blows by accused no. 4 to any one of the injured/deceased persons. Absence of find of blood in any class of examination of the knife produced by him would run counter to his participation in the developed

intention on the part of the first 3 accused persons. He, however, was by the side of the accused 1 to 3 and escaped from the scene of offence. Therefore, he must have had the knowledge about the death resulting from the assault launched by the first 3 accused persons with their knives on deceased Umar Ibrahim and deceased Yusuf. It would, therefore, be clear that he will have to be held responsible u/S. 304 Part-II read with section 34 of the IPC and not for section 302 read with section 34 of the IPC. Conviction and sentence of rest of the accused persons will have to be confirmed.

In so far as accused no. 4 is concerned, he has undergone 11.3/4 years of period of sentence and in our considered opinion, looking to nature of his participation as aforesaid, his conviction shall have to be altered to one u/S. 304 Part-II read with section 34 of the IPC from section 302 read with section 34 of the IPC. Following order is, therefore, passed :-

Conviction and sentence rendered by the Ld. Addl. Sessions Judge to first 3 accused will stand confirmed and the appeal in so far as they are concerned will stand dismissed. Conviction of accused no. 4 is hereby altered to one u/S. 304 Part II read with section 34 of the IPC from section 302 read with section 34 of the IPC and in so far as substantive sentence is concerned, the same is altered from life imprisonment to imprisonment for a period of 10 years and accused no. 4 is also directed to pay fine of Rs.2,000/- (Rupees two thousand only) and in default he shall undergo imprisonment for a period of further one year. Upon computation of the imprisonment so ordered, if it is found that no period is left out, the accused no. 4 shall be set at liberty forthwith if not required for any other case. In so far as he is concerned, the appeal will stand partly allowed accordingly.

* * *

PVR.